

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 13 July 2006**

**Case No.: 2005-LHC-128**

**OWCP No.: 07-165535**

**IN THE MATTER OF**

**ERIC W. TREPAGNIER,**  
Claimant

**vs.**

**NORTHROP GRUMMAN SHIP SYSTEMS, INC./**  
**AVONDALE INDUSTRIES, INC.,**  
Employer

**APPEARANCES:**

**JEREMIAH A. SPRAGUE, ESQ.,**  
On Behalf of the Claimant

**FRANK J. TOWERS, ESQ.**  
On Behalf of the Employer

**BEFORE: PATRICK M. ROSENOW**  
**Administrative Law Judge**

**DECISION AND ORDER**

**PROCEDURAL STATUS**

This case arises from a claim for benefits under the Longshore Harbor Workers' Compensation Act (the Act),<sup>1</sup> brought by Eric W. Trepagnier (Claimant) against Northrop Grumman Ship Systems, Inc./Avondale Industries, Inc. (Employer).

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<sup>1</sup> 33 U.S.C. §901 *et seq.*

The matter was referred to the Office of Administrative Law Judges for a formal hearing. Both parties were represented by counsel. On 24 Aug 05, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based upon the entire record, which consists of the following:<sup>2</sup>

Witness Testimony of

Claimant

Donna Trepagnier

Dott Moffett-Douglas

Exhibits

Claimant's Exhibits (CX) 1-8<sup>3</sup>

Employer's Exhibits (EX) 1-25<sup>4</sup>

Joint Exhibit (JX) 1

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<sup>2</sup> I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

<sup>3</sup> Although Claimant's exhibits were admitted without objection, many of them were unnecessary. CX-1, medical records from West Jefferson Medical Center, included 206 pages of unnecessary medical evidence predating the relevant period in dispute. It also included duplicate pages and was not in chronological order. CX-2, Medical Records of the Bancroft Center, included mostly duplicate pages relating to a period for which the parties stipulated to entitlement to compensation. CX-5 included two sets of the exact same records and CX-6, Claimant's Memory Book, was completely blank. Submitting unnecessary exhibits to the Court wastes the Court's time and delays the issuance of a Decision and Order. They reflect a lack of attention to detail which is a factor to consider in determining appropriate attorney's fees.

<sup>4</sup> Employer's exhibits were also admitted without objections. However, the majority of Employer's exhibits were similarly unnecessary and irrelevant. The first two pages of EX-1 included LS-208s for another claimant and contained dates of injury and OWCP numbers that did not match Claimant's. EX-1 also included duplicate pages. Since the parties stipulated to AWW, EX-9, Claimant's tax records, EX-10, Claimant's social security earning records, and EX-13, Avondale Payroll Register, were also unnecessary. Although EX-12, medical records from West Jefferson Medical Center, included 1,253 pages, all but 107 pages were unnecessary as many of the records predated Claimant's relevant work injury. The small percentage of records that were relevant were not in any logical order. Employer's placement of the relevant medical records in the middle of hundreds of irrelevant pages indicates at best inattention and at worst intent to obscure or conceal. EX-14, Claimant's personnel records with Employer, were unnecessary and irrelevant since all but page 55 pertained to Claimant's prior work with Employer beginning in 1979. The parties stipulated to entitlement to compensation through 18 May 03, rendering EX-17, largely unnecessary. In addition, Dr. Bostick's medical records, EX-18, and Dr. Ciota's medical records, EX-22, which predated 18 May 03, were also unnecessary and irrelevant. EX-19 was unnecessary as the parties stipulated that Claimant was injured at work while in the course and scope of employment. EX-21 included employment records from Brown's Dairy, which were entirely unnecessary and irrelevant. Finally, all of the medical records from Westside Eye Clinic, EX-23, and most of Charity Hospital's medical records, EX-24, were unnecessary as they related to medical treatment prior to Claimant's work related injury, reaching as far back as the 1980s. Review of the record and issuance of a Decision and Order is needlessly delayed when parties submit large amounts of unnecessary and duplicative exhibits rather than review their case files and submit only probative items relating to issues in dispute. While in the case of an employer's counsel, submitting en globo records rather than reviewing them and submitting only the relevant pages might mean fewer hours billed to Employer, it also means more hours required by claimant's counsel to review those documents which may result in higher attorney's fees.

My findings and conclusions are based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

### **STIPULATIONS<sup>5</sup>**

1. There is jurisdiction under the Act.
2. The injury occurred on 15 Nov 02 within the course and scope of employment.
3. An employee/employer relationship existed at the time of the injury.
4. Employer was properly notified of Claimant's injury at the time of accident.
5. There was proper and timely controversion.
6. Some medical benefits have been provided.
7. Claimant had an average weekly wage at the time of injury of \$410.78 with a corresponding temporary total disability rate of \$273.85.
8. Employer paid temporary total disability benefits at a rate of \$273.85 per week from 16 Nov 02 through 17 May 03.

### **ISSUES<sup>6</sup>**

1. Compensable Injury<sup>7</sup>
2. Maximum Medical Improvement
3. Nature and Extent of Injury
  - a. Whether Claimant is entitled to temporary total disability benefits from 18 May 03 and continuing.
4. Suitable Alternative Employment

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<sup>5</sup> JX-1.

<sup>6</sup> JX-1.

<sup>7</sup> Although the parties did not list or argue an issue of compensable injury, in order for the Court to determine the reasonableness of the West Jefferson Medical Center outstanding medical bills, the Court must first determine whether Claimant's myocardial infarction was a compensable injury.

5. Entitlement to and authorization for medical care and services
  - a. Reasonableness of medical treatment at West Jefferson Medical Center in May 2003 for heart problems.
  - b. Choice of physician

## **FACTUAL BACKGROUND**

On 15 Nov 02, Claimant fell from a scaffold, landed on his head, and injured his kidney, spleen, wrist and head. He lost consciousness and was treated immediately at West Jefferson Medical Center where he underwent a splenectomy and treatment for other intra-abdominal injuries. Surgery was also performed on Claimant's right wrist on 16 Nov 02. He treated at the Bancroft Center and West Jefferson Medical Center where he stayed for several weeks. Upon his release from Bancroft Center and West Jefferson Medical Center, Claimant continued treating with the physicians assigned to him while at West Jefferson Medical Center. Claimant had a myocardial infarction on 17 May 03. Eventually, Claimant's treating physicians opined that Claimant reached MMI and could return to work. He began having seizures around July 2004. Claimant has not worked since the accident.

## **POSITION OF THE PARTIES**

Claimant contends that he is entitled to temporary total disability benefits from 18 May 03 to present and continuing. He argues that he is unable to return to his previous employment and that his functional abilities have been permanently affected by his work injury. Claimant maintains that he is unable to return to his regular employment or return to work at all. He suggests that the most Employer could have possibly established is that he could have returned to work in May 2005 within the restrictions laid out in Dr. Puente's August 2005 report, thus entitling Claimant to temporary total benefits from 18 May 03 until May 2005 and partial disability beyond that date.

In addition, Claimant contends that his hospitalization for a mild heart attack was causally related to his work injury of 15 Nov 02 and is compensable. Claimant also argues that he was never given an opportunity to treat with a physician of his choice and that he is entitled to his choice of neurologist, neuropsychologist, and psychiatrist.

Employer, on the other hand, contends that it established suitable alternative employment perhaps as early as May 2003 and certainly as of May 2005. Employer rejects that any relationship exists between Claimant's work-related injury and heart problems. Finally, Employer submits that after Claimant was provided emergent treatment from Drs. Bostick, Puente, and Ciota, he selected these doctors as his choice of physicians by continuing treatment with them over an extended period.

## LAW

### Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment."<sup>8</sup> In the absence of any substantial evidence to the contrary, the Act presumes that a claim comes within its provisions.<sup>9</sup> The presumption takes effect once the claimant establishes a *prima facie* case by proving that he suffered some harm or pain and that a work-related condition or accident occurred, which could have caused the harm.<sup>10</sup>

A claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which *could have caused* the harm or pain.<sup>11</sup> These two elements establish a *prima facie* case of a compensable "injury" supporting a claim for compensation.<sup>12</sup>

Once the presumption applies, the burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that claimant's condition was neither caused by his working conditions nor aggravated, accelerated, or rendered symptomatic by such conditions.<sup>13</sup> "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion.<sup>14</sup> Employer must

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<sup>8</sup> 33 U.S.C. § 902(2).

<sup>9</sup> 33 U.S.C. § 902(a).

<sup>10</sup> *Gooden v. Director, OWCP*, 135 F.3d 1066 (5th Cir. 1998).

<sup>11</sup> *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981), *aff'd sub nom. Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990).

<sup>12</sup> *Id.*

<sup>13</sup> *See Gooden*, 135 F.3d 1066; *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976); *Conoco, Inc. v. Director [Prewitt]*, 194 F.3d 684, 33 BRBS 187 (5th Cir. 1999); *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29 (5th Cir. 1999); *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (5th Cir. 1994).

<sup>14</sup> *Avondale Industries v. Pulliam*, 137 F.3d 326, 328 (5th Cir. 1988); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act

produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a).<sup>15</sup> The testimony of a physician that no relationship exists between an injury and claimant's employment is sufficient to rebut the presumption.<sup>16</sup>

Once an employer offers sufficient evidence to rebut the presumption, the presumption is overcome and no longer controls the outcome of the case.<sup>17</sup> If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole.<sup>18</sup> The presumption does not apply, however, to the issue of whether a physical harm or injury occurred<sup>19</sup> and does not aid the claimant in establishing the nature and extent of disability.<sup>20</sup>

If the work injury aggravates a pre-existing condition, the aggravation is compensable under the Act. Employers accept their employees with the frailties which predispose them to bodily injury.<sup>21</sup> It has been consistently held that the Act must be construed liberally in favor of the claimant.<sup>22</sup> However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubts in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act,<sup>23</sup> which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion.<sup>24</sup>

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is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of the evidence").

<sup>15</sup> See *Smith v. Sealand Terminal*, 14 BRBS 844 (1982).

<sup>16</sup> See *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984).

<sup>17</sup> *Noble Drilling Co. v. Drake*, 795 F.2d 478 (5th Cir. 1986).

<sup>18</sup> *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (4th Cir. 1997); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *Greenwich Collieries*, 512 U.S. 267.

<sup>19</sup> *Devine v. Atlantic Container Lines, G.I.F.*, 25 BRBS 15 (1990).

<sup>20</sup> *Holton v. Independent Stevedoring Co.*, 14 BRBS 441 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112 (1979).

<sup>21</sup> *Britton*, 377 F.2d at 147, 148.

<sup>22</sup> *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).

<sup>23</sup> 5 U.S.C. § 556(d).

<sup>24</sup> *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct 2251 (1994), *aff'g* 900 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences there from, and is not bound to accept the opinion or theory of any particular medical examiners.<sup>25</sup> A claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case and the invocation of the Section 20(a) presumption.<sup>26</sup>

### **Maximum Medical Improvement**

The traditional (albeit not exclusive) method for determining whether an injury is permanent or temporary is the date of maximum medical improvement.<sup>27</sup> The date of maximum medical improvement is a question of fact based upon the medical evidence of record.<sup>28</sup> An employee reaches maximum medical improvement when his condition becomes stabilized.<sup>29</sup>

### **Nature and Extent of Disability**

Once it is determined that he suffered a compensable injury, the burden of proving the nature and extent of his disability rests with the claimant.<sup>30</sup> Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or permanent). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment."<sup>31</sup> Therefore, for a claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown.<sup>32</sup> Thus, disability requires a

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<sup>25</sup> *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98, 101 (1997); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Bank v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, *reh'g denied*, 391 U.S. 929 (1968).

<sup>26</sup> *See Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Director, OWCP*, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982).

<sup>27</sup> *See Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235 n. 5 (1985); *Trask*, 17 BRBS 56; *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989).

<sup>28</sup> *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).

<sup>29</sup> *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978); *Thompson v. Quinton Enterprises, Ltd.*, 14 BRBS 395, 401 (1981).

<sup>30</sup> *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980).

<sup>31</sup> 33 U.S.C. § 902(10).

<sup>32</sup> *Sproull*, 25 BRBS at 110.

causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage-earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.<sup>33</sup> A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement.<sup>34</sup> Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature.<sup>35</sup>

The question of extent of disability is an economic as well as a medical concept.<sup>36</sup> To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury.<sup>37</sup>

### **Suitable Alternative Employment**

If the claimant is successful in establishing a *prima facie* case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment.<sup>38</sup> Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

- (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
- (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?<sup>39</sup>

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<sup>33</sup> *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968) (per curiam), *cert. denied*, 394 U.S. 876 (1969); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996).

<sup>34</sup> *Trask*, 17 BRBS at 60.

<sup>35</sup> *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984); *SGS Control Services*, 86 F.3d at 443.

<sup>36</sup> *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).

<sup>37</sup> *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994).

<sup>38</sup> *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981).

<sup>39</sup> *Id.* at 1042.

Employers need not find specific jobs for a claimant; instead, the employer may simply demonstrate “the availability of general job openings in certain fields in the surrounding community.”<sup>40</sup> Employer may meet its burden by first introducing evidence of suitable alternate employment at the hearing,<sup>41</sup> even though such evidence may be suspect and found to be not creditable.<sup>42</sup>

The employer must establish the precise nature and terms of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available.<sup>43</sup> The administrative law judge must compare the jobs’ requirements identified by the vocational expert with the claimant’s physical and mental restrictions based on the medical opinions of record.<sup>44</sup> Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs.<sup>45</sup> Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for special skills which the claimant’s possesses and there are few qualified workers in the local community.<sup>46</sup> Conversely, a showing of one unskilled job may not satisfy Employer’s burden.

Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful.<sup>47</sup> Thus, a claimant may be found totally disabled under the Act “when physically capable of performing certain work but otherwise unable to secure that particular kind of work.”<sup>48</sup>

A showing of available suitable alternative employment may not be applied retroactively to the date the injured employee reached MMI. An injured employee’s total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available.<sup>49</sup> MMI “has no direct relevance to the question of whether a

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<sup>40</sup> *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039 (5th Cir. 1992).

<sup>41</sup> *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 236-37 n.7 (1985).

<sup>42</sup> *Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003, 1007 n. 5 (5th Cir. 1978).

<sup>43</sup> *Piunti v. ITO Corporation of Baltimore*, 23 BRBS 367, 370 (1990); *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94, 97 (1988).

<sup>44</sup> *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985); see generally, *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992); *Fox v. West State, Inc.*, 31 BRBS 118 (1997).

<sup>45</sup> See generally, *P & M Crane Co.*, 930 F.2d at 431; *Villasenor*, 17 BRBS 99.

<sup>46</sup> *P & M Crane Co.*, 930 F.2d at 430.

<sup>47</sup> *Turner*, 661 F.2d at 1042-1043; *P & M Crane Co.*, 930 F.2d at 430.

<sup>48</sup> *Turner*, 661 F.2d at 1038, quoting *Diamond M. Drilling*, 577 F.2d at 1006.

<sup>49</sup> *Rinaldi*, 25 BRBS at 131.

disability is total or partial, as the nature and extent of a disability require separate analysis.”<sup>50</sup> “[I]t is the worker’s inability to earn wages and the absence of alternative work that renders [him] totally disabled, not merely the degree of physical impairment.”<sup>51</sup>

A job that is too physically demanding for the claimant to perform is not suitable alternate employment.<sup>52</sup> To qualify as suitable alternative employment, the job must accommodate all working conditions required by all physicians of record.<sup>53</sup>

## **Medical Care and Benefits**

Section 7(a) of the Act requires employers to provide reasonable and necessary medical care.<sup>54</sup>

### *Reasonableness of Medical Treatment for Claimant’s Heart Attack*

Section 7(a) of the Act provides that:

The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.<sup>55</sup>

An employer is liable for all medical expenses which are the natural and unavoidable result of a claimant’s work injury. For medical expenses to be assessed against an employer, the expenses must be both reasonable and necessary.<sup>56</sup> Medical care must also be appropriate for the injury.<sup>57</sup>

A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition.<sup>58</sup>

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<sup>50</sup> *Palumbo v. Director, OWCP*, 937 F.2d 70, 76 (2d Cir. 1991).

<sup>51</sup> *Id.*

<sup>52</sup> *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307 (1984).

<sup>53</sup> *Crum v. General Adjustment Bureau*, 738 F.2d 474 (D.C. Cir. 1984) *rev’g in pertinent part*, 16 BRBS 101 (1983); *see also Poole v. National Steel & Shipbuilding Co.*, 11 BRBS 390 (1979) (job meeting only one restriction is not suitable alternate employment); *Jameson v. Marine Terminals*, 10 BRBS 194 (1979) (offering to try employee in job not meeting medical restrictions is not suitable alternate employment).

<sup>54</sup> 33 U.S.C. § 907(a).

<sup>55</sup> 33 U.S.C. § 907(a).

<sup>56</sup> *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979).

<sup>57</sup> 20 C.F.R. § 702.402.

<sup>58</sup> *Turner*, 16 BRBS at 257-258.

Section 7 does not require than an injury be economically disabling for a claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury.<sup>59</sup> Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury.<sup>60</sup>

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect, or refusal.<sup>61</sup> Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury.<sup>62</sup>

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment.<sup>63</sup> Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care.<sup>64</sup> Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care.<sup>65</sup>

### *Choice of Physician*

According to Section 7(b) of the Act, Claimant "shall have the right to choose an attending physician . . . If due to the nature of the injury, the employee is unable to select his physician and the nature of the injury requires immediate medical treatment and care, the employer shall select a physician for him."<sup>66</sup> Necessary immediate medical care contemplates severe injuries, unconsciousness, or other inability to select a physician. After an initial choice of physician, a claimant may not change physicians without prior written consent of the employer or carrier.<sup>67</sup> An employer shall consent to a change in physician where claimant's initial free choice was not of a specialist whose services are

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<sup>59</sup> *Ballesteros*, 20 BRBS at 187.

<sup>60</sup> *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1980); *Wendler v. American National Red Cross*, 23 BRBS 408, 414 (1990).

<sup>61</sup> *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 103 (1997); *Maryland Shipbuilding & Drydock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977).

<sup>62</sup> *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294 (1988); *Rieche v. Tracor Marine*, 16 BRBS 272, 275 (1984).

<sup>63</sup> See generally, 33 U.S.C. § 907(d)(1)(A).

<sup>64</sup> *Mattox v. Sun Shipbuilding & Dry Dock Co.*, 15 BRBS 162 (1982).

<sup>65</sup> *Id.*

<sup>66</sup> 33 U.S.C. § 907(b).

<sup>67</sup> 33 U.S.C. § 907(c)(2).

necessary for and appropriate to, the proper care and treatment of the compensable injury.<sup>68</sup> Consent for change of physician may be given upon a showing of good cause. Claimant's treating physician may refer claimant to a specialist for services which are necessary for the proper care and treatment of his compensable injury.<sup>69</sup>

When an employer selected an employee's physician in an emergency, the employee may change physicians when he is able to make a selection.<sup>70</sup> Such changes must be made upon obtaining written authorization from the employer, or if consent is withheld, from the district director.<sup>71</sup> A claimant may select his choice of physician by his implicit acquiescence to continue treating with the physician and his subsequent referrals.<sup>72</sup>

## EVIDENCE AND ANALYSIS

### Testimonial and Medical Evidence

***Eric W. Trepagnier, Claimant, testified at trial and in his deposition that:***<sup>73</sup>

Claimant was born on 22 Sep 56. He first started seeing Dr. Puente through West Jefferson Medical Center right after his accident. While at West Jefferson he was in the intensive care unit (ICU). When he was released from ICU he was placed in a nearby rehabilitation center. He then went back to West Jefferson Medical Center and then to another rehabilitation center. He left the hospital about one week prior to Christmas and was told to go for a follow-up examination within one to two weeks after his release with Dr. Puente. Claimant never signed a form stating that Dr. Puente was his permanent doctor or his choice of physician. He just needed to treat with a doctor and he went and saw one. He was not thinking about whether Dr. Puente was "his doctor." He just went to him because one doctor is as good as another.<sup>74</sup>

Claimant was admitted into West Jefferson Medical Center in May 2003 because he had a heart attack. He had surgery that same night. He denied ever having problems with his heart prior to his work injury. Claimant testified that he has also started "catching strokes" since his work injury.<sup>75</sup>

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<sup>68</sup> Id.

<sup>69</sup> 20 CFR § 702.406(a).

<sup>70</sup> 20 CFR § 702.405.

<sup>71</sup> 20 CFR § 702.405; *Bulone v. Universal Terminal & Stevedoring Corp.*, 8 BRBS 515 (1978).

<sup>72</sup> Relying on 20 CFR § 702.406(a); see *Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988); *Hunt v. Newport News Shipbuilding and Dry Dock Co.*, 28 BRBS 364, 370-371 (1994).

<sup>73</sup> Tr. 19-34; EX-4 (Claimant's deposition).

<sup>74</sup> Tr. 19-20, 30-31.

<sup>75</sup> Tr. 20-21.

He admits to doing chores around the house, but denied going anywhere to earn money.

Claimant quit high school after the 11<sup>th</sup> grade. He is able to read and write. He denied that he did not graduate because he was drinking too much and stated that he did not graduate because he was working at night. When asked about his deposition testimony that he did not graduate because he drank too much, had money in his pocket and “anything [he] needed to drink [he] got from the job;” he responded that he “never did drink too much” and was merely working a lot. He again denied that he did not graduate because of his drinking. In his deposition, he had clarified that he did not drop out of school because of his drinking. He testified that he dropped out because he was originally passed to the 12<sup>th</sup> grade, but when he started the 12<sup>th</sup> grade he was called into the office and told that it was a mistake and he should be back in the 11<sup>th</sup> grade. This caused Claimant to quit school. He does not have a GED. He never had any vocational or technical training.<sup>76</sup>

His prior work history includes working as a boxman at Barbe’s Dairy for about eight years, an electrical helper with MyTech, and an electrician’s helper at EIU. He has not looked for a job since his accident because he was injured, sick, and hurt. He first started working for Employer’s shipyard in 1979 as a ship-fitter helper. He also worked for Employer doing tack work, using a welding rod. He did not recall when he started working for Employer prior to his accident. He never really quit, the jobs just played out. He did leave Barbe’s Dairy to go work for Employer because Employer paid better. The last time he was employed was with Employer on 11 Nov 02, the day of his accident. He worked for Employer as a scaffold builder. He earned \$9-10 per hour working for Employer for 40 hours per week.

He denied telling Dr. Puente or Dr. Ciota that he had not returned to work because his lawyer told him not to, even if their records reflect otherwise. His lawyer never told him that he could not return to work.<sup>77</sup>

Claimant could not recall exactly when, but when he worked for Barbe’s Dairy, he was sent to Alcoholics Anonymous (AA) for about 12 weeks. The employer sent him there because he had alcohol on his breath. The program “didn’t do no good.” The meetings did not help because he was not ready to give up drinking. He reasoned that it is the only bad habit he had. He never underwent alcohol treatment while in high school and there are no other instances of treatment for alcohol abuse. He never told his employers that he had a drinking problem; it was just something they assumed. He has not been back to an AA meeting since and did not find it helpful at all.

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<sup>76</sup> Tr. 21-25; EX-4, pp. 14-17, 21.

<sup>77</sup> Tr. 25-27; EX-4, pp. 21-29, 61.

After his initial discharge from the hospital after his work injury, he was sent to Bancroft Rehabilitation Center for physical therapy. He admitted telling them that he was drinking, but not on the job. He denied ever telling them that he went to rehab before for alcoholism. He also denied ever being hospitalized for alcohol poisoning. Since his accident he does not drink as much because nobody will buy him alcohol on account of his condition. Whenever he can save change, he will buy himself a ½ pint of vodka. Every time someone sends him to the store, he takes a quarter. He saves the money until it adds up. When it adds up, he sneaks out and buys himself a bottle of alcohol. He has never been treated for drug addiction.<sup>78</sup>

He does not have a driver's license and has not had one for about nine years. Neither he nor his wife owns a vehicle. The last time he owned a car was in 2002. He had gotten a car for his stepson. The only time he used the car was when he worked out on the drilling rig. He usually got to work with one of the guys he worked with. Public transportation is his primary source of transportation.<sup>79</sup>

He continues to receive medical treatment. He last saw Dr. Puente about one week prior to the formal hearing. Dr. Puente mentioned returning to work, but Claimant does not want to because he is scared. He wants to work, but if he cannot earn enough money he does not want to work. Dr. Puente tells him to go work at a grocery store or a supermarket, but he has a wife, child, and bills. Claimant is married and has a twelve year old daughter. He is used to making \$300-400 per week. He would like to make a reasonable amount of money to pay his bills, but \$150 per week is no money. He needs to earn at least over \$300 per week. He wants to go back to work, but he cannot just take any job. He has financial constraints that make it really important for him to earn money for his family and some of the jobs that are considered SAE are problems because they do not pay enough money. He cannot afford a minimum wage job because the money would not be right, plus he also fears for his safety. He has to split the check halfway because of his wife and daughter and he would not have anything left for him.<sup>80</sup>

He will work if he finds a job that can provide for him that also pays the money he needs to survive. "[W]orking at a grocery store or at Popeye's ain't going to get it." If a job does not pay more than \$300 per week, then he is not interested in the job. Physically, however, if he knew that he could earn more than \$300 per week, Claimant could go back to work. His physical condition is not preventing him from going to work; it just does not pay enough money because he has to pay \$54 per week for child support. He did state that he has not looked for work because he was not able to work because of his "bad toes." His toes were infected and he received medical treatment, pain medication, and antibiotics at Charity Hospital and West Jefferson Medical Center. His toes also cause problems with his ability to walk like he wants and he can only wear

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<sup>78</sup> Tr. 27; EX-4, p. 17, 35-38, 46-47, 58-59, 62, 68-69.

<sup>79</sup> EX-4, pp. 20, 65.

<sup>80</sup> Tr. 28-30; EX-4, pp. 67-68.

sandals. Claimant has not been told by any doctor that he could not return to work. He also testified that he is prevented from going back to certain types of work because he is still afraid for his life since his accident. He is always on safety mode because of his fear of re-injuring himself. As of the formal hearing, Claimant was not earning any money and had not made anything since his disability was stopped. He is trying to get Social Security Disability benefits and is waiting on a hearing to determine his eligibility.<sup>81</sup>

When he thinks for too long, Claimant gets headaches. He denied having headaches prior to his 15 Nov 02 work injury. He also started having seizures since his 2002 injury and takes medication to try to control them. He does not believe his head injury has improved since his accident, but he has not told any of his doctors this. He also has trouble sleeping. The pain in his toes keeps him from sleeping. He never had problems with his toes prior to his 2002 work injury.<sup>82</sup>

When Claimant lives with his wife, a typical day begins with him getting up and pressing his wife's clothes. He also watches his daughter get on the bus from the stairway. He also goes to the store, takes out the trash, and picks up trash from the yard for his mother. He does not cook. He goes to the washery to clean clothes. He does not have friends that he spends time with and he does not go to church. He and his wife do not go out together. He has been living with his wife off and on. If he is not staying with his wife, he is living at his mother's house.<sup>83</sup>

***Donna Trepagnier testified at trial in pertinent part that:*<sup>84</sup>**

She has been married to Claimant for seventeen years. Since Claimant's accident, he "acts like a child." He tells her how he feels, how his head worries him, and how his stomach bothers him. He has not been right since his fall. When Claimant gets around people now, he just sits. He might talk sometimes, but in the next instance, he is mad and upset. Anything can make him mad – he gets mad out of the blue. Claimant is not the same person she knew before the fall.<sup>85</sup>

He has inappropriate interactions with people under normal circumstances. He picked a fight with one of their neighbors because he felt the neighbor "liked" her. In another instance, when she went to pick him up at his mother's house, Claimant's brother told her that he was getting violent with someone else. She does not believe that Claimant knows what he is saying half the time. He gets himself into trouble by going

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<sup>81</sup> Tr. 30-34; EX-4, pp. 52-54.

<sup>82</sup> EX-4, pp. 50-51, 59, 66.

<sup>83</sup> EX-4, pp. 63-65.

<sup>84</sup> Tr. 36-47.

<sup>85</sup> Tr. 37-39.

around picking fights with people. He never did this before his accident and everyone is asking her what is wrong with him because of how different he acts now. He even gets mad at his daughter for just calling to him. He starts swearing at her. He does not want anybody telling him anything. This has become a daily occurrence.<sup>86</sup>

Claimant can do little things around the house, like sweep, wash dishes, and take out the trash. They live in an apartment so there is no yard work. When she leaves him with instructions he can usually follow them so long as he does not forget, which he usually does. When she tells him to do something, he waits awhile. Also, if she sends him to the store, he comes back and forgets what he was supposed to get. Anything that he can actually do, he forgets to do it. Claimant does not drive and mostly stays up in the room watching television.<sup>87</sup>

She went with Claimant to see Dr. Puente. She told Dr. Puente that Claimant could not think and that his nerves were terrible. His nerves get so bad that Claimant begins to shake. Claimant's behavior is affecting her. She had to take a stress test because she is having problems dealing with him and her mother who is also sick.<sup>88</sup>

He used to love to work. He was strong; now he is weak and there is nothing much that he can do. Claimant started having seizures and has wet the bed. She took him to Charity Hospital. Claimant was told that he cannot be alone sometimes. Claimant's daughter was there during his first seizure. No one knows when he will have another seizure. He did not have the seizures prior to his accident. She was lying in bed and heard the bed shaking. She turned around and asked Claimant if something was wrong, but he just kept shaking. He was soaking wet and her son called an ambulance. The EMT told her Claimant had a seizure. He had another seizure at his mother's house. Claimant's daughter witnessed that seizure. Claimant's mother took him to the hospital because of the seizure. This was about 7-8 months before the formal hearing. The doctor at West Jefferson Medical Center said Claimant probably had one or two seizures before the first one that no one knew about. Mrs. Trepagnier only witnessed one seizure.<sup>89</sup>

She has taken care of Claimant since his work-related accident. It is "nothing nice" taking care of somebody sick. She is not a medical or psychiatric doctor. She is not presently employed because she is taking care of Claimant and her own mother. She last worked nine years ago.<sup>90</sup>

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<sup>86</sup> Tr. 39-41.

<sup>87</sup> Tr. 45-47.

<sup>88</sup> Tr. 40-41.

<sup>89</sup> Tr. 41-43.

<sup>90</sup> Tr. 43-45.

## Medical Evidence

Claimant received continuous medical treatment from the date of his injury, 16 Nov 02.

***Dr. Megan Ciota states in her deposition and medical records in pertinent part that:***<sup>91</sup>

She is a clinical psychologist and neuropsychologist. Claimant was initially seen by Dr. Ciota in December 2002 as an inpatient at West Jefferson Rehabilitation Center and for a follow-up in January 2003. She performed a follow-up neuropsychological evaluation on 17 Jun 04 at the request of Dr. Puente. His initial injuries in 2002 included a right wrist fracture, ruptured spleen, and left frontal skull fracture. Imaging studies showed a left frontal skull fracture and a left frontal contusion and subarachnoid hemorrhage. Dr. Puente provided her with medical records, including the normal November 2003 EEG. A normal EEG indicates that there was no place where seizures would come from. She also reviewed the normal November 2003 CAT scan. It showed encephaliomalacia, a shrinkage area of damage in the brain, which signifies some brain tissue death in the left inferior funnel cortical area.<sup>92</sup>

### 17 Jun 04 Neuropsychological Examination

On 17 Jun 04, Dr. Ciota took an updated history. Claimant informed her that he had occasional headaches. He takes Tylenol for the headaches, but it does not fully alleviate his pain. He needs to lie down and the “edge comes off” in about 15-20 minutes. He also reported a decreased appetite with no loss of weight. Claimant also informed her that he had “blackout” three times, but had not sought medical care for the blackouts. The blackouts occurred when he snuck out of the house to sell his plasma for money for food and cigarettes. He also recalled feeling faint while helping a woman push her stalled car. He admitted to driving even though his license is suspended. She did not know whether Claimant could not drive because of his work injury or because of something else. He does not go fishing or visiting friends. His family fears that he will go out and get hurt. Consequently they are always looking after him and watching what he does. That is why he sneaks out – being monitored gets on his nerves. Although his family tries hard to supervise, Claimant nevertheless puts himself and others in serious danger when he sneaks out, drinks, and drives. Claimant was very forthcoming and not evasive.<sup>93</sup>

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<sup>91</sup> EX-6; EX-22; CX-3.

<sup>92</sup> EX-6, pp. 5-8, 33-34; CX-3, p. 1.

<sup>93</sup> EX-6, pp. 36-38, 48, 50; CX-3, pp. 2, 4; EX-22, p. 15.

Dr. Ciota did not test his cognitive abilities, but asked specific questions about cognitive functioning. Claimant had difficulty focusing and with short-term and remote memory. He admitted to struggling with his sense of direction and getting “mixed up.” He also reported problems with finding words. Other than verbal fluency, language functions are not related to the frontal lobe. He denied any change in his ability to use mechanical devices, drawing, or any other hand motor skills. He also denied any visual, audio, taste, or smell problems. He reported problems with vertigo, stating that ever since his accident he feels like he is “tripping.” Because she was not able to test Claimant’s cognitive abilities, she could not opine for sure as to whether Claimant could return to work from a neuropsychological perspective. Behavior is a really important component of the frontal lobes that are not going to necessarily show up on an attention test. Regardless, even people with behavior problems are capable of doing something to earn money.<sup>94</sup>

Claimant described feeling short tempered, agitated, and irritable. He snaps at his wife and is afraid that he will re-injure himself just walking down stairs. He indicated that he is not sleeping well and frequently wakes up throughout the night. He did not attribute these behaviors to anything specific, just stated this is how he feels since his work injury.<sup>95</sup>

She discussed with Claimant his substance abuse history. He denied having a history of drug use, but reported a long history of alcohol and tobacco use. He divulged that one of his prior employers sent him to Alcoholics Anonymous meetings in the 1980s, but he resumed drinking soon afterwards. He also admitted to smoking ½ pack of cigarettes per day. He admitted that he steals money from his wife to buy alcohol. He also sells CDs to buy alcohol. Once he has enough money for alcohol, he sneaks out to buy it. She could not attribute his sneaking out to the work injury because she does not know anything about his pre-injury condition. He tries to buy a pint of vodka and a 40-ounce beer at least twice per week to get drunk. Dr. Ciota opined that Claimant needs treatment for his substance abuse and that supervision was really important. His alcohol problems could have been from his accident, made worse by it, or could be that he was always like that. She simply did not have enough information to make that judgment.<sup>96</sup>

At the time of the 17 Jun 04 evaluation, Claimant recently left his wife because she did not like the way he treated their daughter. He reported that he wanted to divorce his wife. He was dropped off at the evaluation by a family member and Claimant tried to convince Dr. Ciota’s office that it was alright for him to leave after the interview. He admitted that he wanted to go buy alcohol. He was retained until his family arrived to pick him up. This was just further evidence of his substance abuse problem. In addition

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<sup>94</sup> EX-6, pp. 38-39, 48-49, 70, 73; CX-3, pp. 2-3; EX-22, pp. 15-16.

<sup>95</sup> EX-6, p. 40; CX-3, p. 3; EX-22, p. 16.

<sup>96</sup> EX-6, pp. 40-41, 47-48, 53; CX-3, p. 3; EX-22, p. 16.

to his head injury, Claimant has a long standing history of significant alcohol abuse and substance abuse that makes regulating his behavior even more challenging. She could not attribute the alcohol abuse to the accident because he had those problems prior to his work injury.<sup>97</sup>

Claimant initially underwent a neuropsychological evaluation in December 2002 and January 2003. The previous testing revealed problems primarily with executive functioning – managing, organizing, responding. Dr. Ciota had several areas of significant concern: driving, unsupervised elopement, poor decision-making, and lack of insight. She diagnosed Claimant with traumatic brain injury with neurocognitive and behavioral sequelae. There are some deficits that she found on testing that seemed to be a result of his head injury because his performance was not as good as she would expect given his IQ of 69. He was perseverative. He got stuck on things and repeated them. This occurs a lot with head injuries. He was also impulsive. He had trouble organizing information on memory tests. Attention does not have to be impaired every minute for someone to have attention impairment. She did not perform additional testing on 17 Jun 04. She only did the interview because she believed the testing was not approved. The caseworker told her that the interview would be reviewed and recommendations would be made from there. Since she did not do any testing in June 2004, she had nothing to compare the January 2003 test results to. Behaviorally, there did not appear to be any big improvement.<sup>98</sup>

Based on his 2004 evaluation, Claimant did not appear to be exercising sound judgment or good behavioral control. Executive discontrol is consistent with a significant frontal lobe injury. Executive discontrol includes behaviors such as being impulsive, having trouble staying composed, lack of attention and attention spasms, and problems with decision-making. She does not relate Claimant's drinking problems to executive discontrol because he has a history of alcohol abuse going back to the 1980s. In addition, she did not have a second test to see if his executive control improved. It is not that Claimant does not have discontrol problems; she just needs additional testing before she can give an expert opinion. These problems could be with him the rest of his life. Claimant also reported new memory problems. Dr. Ciota strongly advised keeping Claimant on 24-hour supervision. She also recommended treatment for longstanding substance abuse. Dr. Ciota wanted to perform additional testing to help understand the nature of his complaints and to have a better understanding of his spared abilities to help with planning for him.<sup>99</sup>

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<sup>97</sup> EX-6, pp. 42-; CX-3, pp. 3-4; EX-22, pp. 16-17.

<sup>98</sup> EX-6, pp. 35, 46, 63-65; CX-3, pp. 4, 6-16; EX-22, pp. 2-12, 17.

<sup>99</sup> EX-6, pp. 54, 58, 64; CX-3, p. 4; EX-22, p. 17.

If Claimant is given his best shot to get back to some purposeful life, then there needs to be a comprehensive approach. It is within her specialty to determine and request the type of rehabilitation Claimant needs. Claimant needs a vocational rehabilitation specialist who will go to the job site and help identify appropriate jobs. Her neuropsychological testing will help determine what Claimant is capable of doing. She opined that Claimant will not get anywhere without substance abuse treatment. If he undergoes substance abuse treatment, even AA meetings, he would not need constant cognitive rehabilitation, just help applying for a job and figuring out what he needs to do at work. When there is vocational rehabilitation and training there is more likely a chance of success. If Claimant was not drinking significantly prior to his injury and then got injured and developed executive discontrol, then his resuming drinking could be a response to his work injury.<sup>100</sup>

Claimant is concerned about his health. He had symptoms associated with complaints of depression that were elevated. There was some suggestion that he was trying to present in a positive light and denied questions that were overtly related to his substance abuse. She believes that Claimant's frontal lobe injury had some kind of effect on his mental facilities. In order to have post-traumatic depression, however, there must have been a life threatening event that is remembered. Falling 17 feet onto one's head is such an event if the person remembers it happening. Claimant told her he did not have a good memory of the fall. Statements that he is afraid of falling again or of re-injuring himself are not indicative of post-traumatic stress. There has to be a kind of numbing experience, like heart palpitations, not just being afraid. Dr. Ciota reviewed Claimant's anxiety symptoms and felt like he did not meet the criteria for post-traumatic stress/depression. Claimant may be irritable and grumpy but he has a lot on his mind, being monitored, having his freedom taken away, and not being able to come and go as he chooses. He does not appear to be clinically depressed.<sup>101</sup>

To her knowledge, Claimant does not have sensory deficit. His injury was on the left side, so one expects right sided problems. His gross and fine motor function was below average to moderately impaired. She did not know what to attribute these deficits to. People with executive frontal lobe injuries often have trouble with their quickness and Claimant is in the mildly impaired range. The ability to store information is disrobed by the frontal lobe, but does not impact the ability to retrieve or organize information. Claimant's head injury impacted his ability to store information. He has no immediate memory. He has the ability to learn and remember, but has trouble getting it together, which is symptomatic for frontal lobe injuries. There were no signs of malingering or exaggeration. He was not trying to make himself look more impaired than he actually was.<sup>102</sup>

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<sup>100</sup> EX-6, pp. 54-59.

<sup>101</sup> EX-6, pp. 61-63, 80-81.

<sup>102</sup> EX-6, pp. 73-76, 79.

Claimant needs more testing to find out what is going on from a neurocognitive standpoint. She needs to see where he is now compared to his first tests back in January 2003. This will help get a picture of how he is functioning right now to make some plans to develop a vocational goal to pursue. She believes Claimant is as healed as his brain is going to be and can possibly do better with support. His brain is never going to undergo some miraculous healing. She does not expect Claimant to get much better, but thinks his functioning can be improved. She defers to Claimant's physical doctor regarding his work status.<sup>103</sup>

#### March 2005 – April 2005 Neuropsychological Re-evaluation

Dr. Ciota conducted a neuropsychological re-evaluation in March and April 2005. The purpose of the exam was to re-evaluate Claimant's neuropsychological and cognitive functioning to see if any deficits were present in relation to known patterns of brain/behavior functioning and to help establish whether a causal relationship exists between current functioning and Claimant's work injury. She conducted an interview and obtained an updated history. Claimant reported that he still has to sneak out to go anywhere; has financial hardship and sells personal items to pay bills and buy things; has difficulty with short term memory; has difficulty reading, but refuses to buy reading glasses for fear of looking old; and although he is not supposed to, he continues to drive whenever he has the opportunity. He also provided her with an updated medical history.<sup>104</sup>

Claimant had a seizure on 03 Jul 04. He passed out and urinated on himself. He denied drinking at the time. He was taken to West Jefferson's emergency room. On 10 Mar 05, Claimant had another seizure. His daughter found him shaking in bed. He was again taken to the emergency room and prescribed Dilantin for the seizures. His most recent seizure occurred on 22 Mar 05. He was getting out of bed to go to the bathroom when he fell and had a seizure. His wife witnessed this seizure. Given the possibility of seizures, he should be evaluated formally. Alcohol abuse and withdrawal may contribute to his seizures.<sup>105</sup>

Claimant reported feeling frustrated that he cannot do whatever he wants to do, but denied symptoms of depression or anxiety. He also outwardly denied psychotic thought processes, such as hallucinations. He told Dr. Ciota that he continues to drink whenever possible. He understands that he is not supposed to drink because of his seizures and "plans on cutting back to beer."<sup>106</sup>

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<sup>103</sup> EX-6, pp. 81-83, 88.

<sup>104</sup> EX-11, pp. 1-2.

<sup>105</sup> EX-11, pp. 3, 18.

<sup>106</sup> EX-11, p. 3.

Claimant reported a desire to return to work because he is tired of doing nothing. He would like to obtain work in the repair department with Employer, work washing and cleaning safety glasses, or cutting glass. He also has an interest in electrical work, as long as he does not have to climb. He would not consider working at a fast food place for \$4-5 per hour. He preferred to wait until legal matters were resolved. If his disability payments were high enough, he would not return to work.<sup>107</sup>

Claimant arrived on time and alone for his re-evaluation. He was dropped off at Dr. Ciota's office. He ambulated normally and did not evince pain behaviors, except regarding his infected feet. His speech was fluent with no obvious difficulties finding words. His interaction was appropriate until the last day of testing. During the last day of testing, on 01 Apr 05, Claimant fell asleep, spoke loudly, danced around stating "I'm gonna get paid," and told the examiner that she could not have his money, he was going to get a Bahama Mamma. Throughout the previous testing days Claimant was mild mannered. The first day, Claimant was alert and lasted from 10-3 before he became tired and hungry. On the second day he was tested from 9-12 and 12:45 – 2:30 before becoming tired during the last half hour of testing. On the last day, however, Claimant needed to be roused to stay awake during testing. Regardless, there was little evidence of slowed thinking, he did not answer impulsively until the last day, no obvious problems with perseveration or confabulation on testing.<sup>108</sup>

Symptom validity tests were administered and Claimant's scores indicated good effort. Claimant's performance during the general intellectual ability testing revealed that he was in the extremely low range of verbal functioning, the borderline range of performance functioning and the extremely low range of full scale functioning. His work knowledge was also a weakness. Claimant's ability to focus his attention is mildly impaired and he has problems with inattentiveness and impulsivity. Claimant's sensory perceptual functions were tested. Deficits can be possible indicators of the brain damage in the opposite hemisphere. He made 11 right-sided errors of fingers agnosia and 10 left sided errors of finger agnosia. This indicates impairment in his perceptual functions.<sup>109</sup>

She also tested Claimant's motor functions by measuring finger tapping speed, dexterity of the hands, and visual motor integration skills. These skills are sensitive to brain injuries, especially frontal lobe injuries. Claimant's motor functions ranged from below average-borderline to average. Claimant's visual organizational capacity, visual motor integration and planning, and visual memory abilities were in the extremely low range of performance.<sup>110</sup>

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<sup>107</sup> EX-11, p. 4.

<sup>108</sup> EX-11, p. 6.

<sup>109</sup> EX-11, pp. 7-10.

<sup>110</sup> EX-11, pp. 11-12.

Current testing showed mild decreases in Claimant's attention performance and diminished auditory perceptual abilities from previous testing. Claimant's reading ability and acquired knowledge were predictive of his pre-injury intellectual ability. In addition, gross impairment in intellectual ability is expected in injuries such as Claimant's. It is very likely that his pre-injury abilities were impaired and that the current diminished performance is not a result of his head injury. She found it encouraging that Claimant's learning and memory abilities rebounded as well as they did, it indicates recovery of function. Other areas that showed diminished performance – auditory processing, attention, executive functioning – are not expected to diminish over time as a result of a one-time head injury. Cognitive problems surrounding a head injury often improve in the first year after the injury and then stabilize. She believes factors other than the head injury affected these performances.<sup>111</sup>

It is of great significance that Claimant continues to abuse alcohol. Both alcohol and cardiac problems are risk factors for diminished cognitive functioning over time. Claimant's substance abuse must be addressed and precludes other psychological and vocational interventions.<sup>112</sup>

Claimant reported a desire to return to work because he is “financially unhappy,” but expressed that he is unwilling to return to work until his legal matters are resolved. Plus, if financially stable, he is not motivated to work.<sup>113</sup>

There is no indication that long-term personality and psychological issues played a role in Claimant's behavioral presentation. Claimant's long standing substance abuse indicates that pre-accident factors are likely playing a significant role in his post-injury condition. Given the extent of his substance abuse problems, his resistance to treatment and problem admission, and his motivation to ride out his legal suit, prognosis for positive progress is poor.<sup>114</sup>

***Dr. Michael Puente testified by deposition and his medical records reflect in pertinent part that:***<sup>115</sup>

Dr. Puente is a board-certified neurologist. Neurology is the practice of medicine that involves treatment of the nervous system including the brain, the central nervous system, the spinal cord, and the nerves and muscles, which is considered the peripheral nervous system. It is a non-surgical specialty.

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<sup>111</sup> EX-11, p. 17.

<sup>112</sup> EX-11, pp. 17-18.

<sup>113</sup> EX-11, p. 18.

<sup>114</sup> EX-11, p. 18.

<sup>115</sup> EX-5; CX-4 and EX-19 (reflect Dr. Puente's medical records).

He first examined Claimant on 12 Dec 02 at the West Jefferson Rehabilitation Unit. Claimant was referred there for a brain injury. Claimant fractured his skull and had a traumatic intracranial hemorrhage called a traumatic brain injury. It was difficult to ascertain whether the injury was to the entire brain or just parts of the brain. The blood in the brain is like any bruise or contusion; the body gradually absorbs up the blood and breaks it down. The blood usually takes anywhere from three to six months to absorb. Although a brain injury tends to take three to six months for natural recovery, the residual deficits would be in the order of cognition, behavior, judgment, rationality, and memory. His left frontal area was also fractured. Patients with a fractured skull usually take over six months to heal. The skull is very stable. As long as the injury is a non-complex skull fracture, like Claimant's injury, it heals on its own because the skull does not move. Claimant did not have to avoid any type of activity due to his fractured skull. As a result of Dr. Puente's 12 Dec 02 examination, he found a degree of confusion and difficulty with Claimant's word finding ability.<sup>116</sup>

A person who suffers a traumatic brain injury will likely have some cognitive deficits. Patients with brain injuries are not very reasonable or appropriate – it is almost like dealing with a child. Speech therapists, neuropsychologists, and occupational therapists are all trained to work with cognitive deficits. Physical therapy can also help patients along since it is a matter of retraining the brain. Medication may help with levels of alertness, behavior, and cooperation. Claimant received continued care and monitoring by Dr. Puente while he was at West Jefferson Medical Center and Bancroft Rehabilitation Center.<sup>117</sup>

He saw Claimant for a follow-up evaluation on 19 Sep 03 at the request of Claimant's attorney. He initially treated Claimant at the hospital immediately following his work injury in November 2002. He knew some of Claimant's medical history and that he had a lot of problems with initial agitation and combativeness related to his traumatic brain injury and was initially admitted to the psychiatric unit by Dr. Davis because of his behavioral problems. His behavior improved and he was transferred to West Jefferson Medical Center for inpatient rehabilitation. His supervision level during inpatient rehabilitation was essentially independent to slight.<sup>118</sup>

At the 19 Sep 03 evaluation, Claimant informed Dr. Puente that he had required hospitalization for one episode of alcohol poisoning, but could not recall when. He also told Dr. Puente about several episodes of loss of consciousness and hospitalization at West Jefferson Medical Center after at least one episode. Claimant admitted that some of his loss of consciousness moments occurred after he donated plasma to try to earn some spending money. After he donated plasma, he was out in the heat and felt weak and lightheaded while waiting for the bus. That is when he had a sudden loss of

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<sup>116</sup> EX-5, pp. 5-8, 12-18, 79.

<sup>117</sup> EX-5, pp. 18-21.

<sup>118</sup> EX-5, pp. 31-32; CX-4, pp. 7-8; EX-19, pp. 3-4.

consciousness. He had another loss of consciousness after he donated plasma and tried to help a lady push her stalled vehicle. Claimant is concerned that these incidents are related to his head injury. Claimant also informed Dr. Puente that he suffered a mild myocardial infarction where he was hospitalized at West Jefferson Medical Center.<sup>119</sup>

Claimant admitted to drinking from “time to time,” but is aggravated with his wife because she does not let him come home drunk. He finds his wife to be very controlling and he has difficulty dealing with that. As of 19 Sep 03, Claimant was neurologically intact, but Dr. Puente would defer final neurological disposition. There were no abnormalities other than his right hand being a little weak, which was expected because of his wrist fracture. Claimant came in stating he was fine and seemed appropriate, so Dr. Puente did not dig deep. He did not find any confusion when he examined Claimant and there was nothing inappropriate about his behavior. Dr. Puente believed Claimant’s condition “definitely improved” since 12 Dec 02. Dr. Puente concluded that the episodes of loss of consciousness appear to be fainting episodes probably caused by dehydration, overheating, and exhaustion. To some degree the loss of consciousness episodes may even be anemia given that it usually occurred after he donated plasma, but Dr. Puente did not believe they were related to Claimant’s work injury. As of 19 Sep 03, Dr. Puente thought Claimant had healed very nicely based on the information Claimant gave him.<sup>120</sup>

Claimant returned for a follow-up examination on 19 Nov 03. He did not show up for his scheduled CAT scan or EEG. Claimant denied any additional episodes of loss of consciousness since September even though he has donated plasma for extra cash. After he donates his plasma, Claimant gets a quart of beer to drink. He sits down and drinks until he feels better. His “heart hurts because [he does not] have any money right now to buy liquor.” He admitted to drinking on average ½ pint of vodka most days and does “quite well with it” because it makes him feel better. Dr. Puente reminded Claimant that he should not consume any alcohol. He could not recall Claimant’s reaction to being told he should never drink alcohol. Claimant denied having headaches or other pains. He had no real complaints and the examination appeared unremarkable. Since the recommended diagnostics were not performed, he did not believe Claimant should return to work in any capacity as of 19 Nov 03. However, he contradicted himself by also testifying and reporting in his medical records that in the meantime, Claimant could do limited duties with no climbing or working at heights and no lifting more than 30 pounds. On 19 Nov 03, Dr. Puente gave Claimant a prescription for light duty work with no lifting greater than 30 pounds. Dr. Puente rescheduled the missed tests, but if the tests were unrevealing, Dr. Puente intended to release Claimant to return to full duty work from a neurological standpoint.<sup>121</sup>

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<sup>119</sup> EX-5, pp. 33, 35; CX-4, p. 8; EX-19, p. 4.

<sup>120</sup> EX-5, pp. 37-40; CX-4, pp. 8-9; EX-19, p. 4.

<sup>121</sup> EX-5, pp. 43-49; CX-4, pp. 11-12, 14; EX-19, pp. 6-7, 24.

On 30 Dec 03, Claimant saw Dr. Puente for a follow-up examination. Claimant reported no new episodes of loss of consciousness. He had no complaints other than occasionally feeling lightheaded, mostly after donating plasma. Claimant described occasional aches and pains including headaches, but nothing significant. Claimant did not have problems with headaches prior to his work injury. Dr. Puente reviewed the EEG which was normal. A normal EEG does not exclude the possibility of seizures, but it makes it much less likely. The EEG would also show slowness in certain areas when a patient had an extreme brain injury. Claimant's EEG did not show slowness. He also reviewed the 24 Nov 03 CAT scan of the brain and compared it to the 11 Feb 03 scan. There was no acute abnormality or other adverse change since the previous study. The CAT scan showed that his old injury healed by 24 Nov 03 and there was no hemorrhage left. There can be behavioral residual problems that will not necessarily be reflected in an EEG or CAT scan. However, based on his negative workup and normal examination, from a neurological perspective, Dr. Puente cleared Claimant to resume full duties at work with no restrictions. He did not recommend other treatment because it appeared that Claimant recovered from his injuries and Dr. Puente's services were no longer required.<sup>122</sup>

Dr. Puente originally discharged Claimant from his care on 30 Dec 03 because Claimant reached MMI and could return to work at full duty.<sup>123</sup>

Dr. Puente performed a neurological follow-up examination on 06 Feb 04 at the request of Claimant's attorney. Claimant had not returned to work. When asked why he did not go back to work, Claimant responded that his lawyer told him not to go back to work yet. He denied any confusion, headaches, or anything else of significant importance. Claimant's major complaint was swelling and pain in the digits of his left foot. Dr. Puente examined Claimant's toes and opined that they may be infected, but it was nothing serious. He did not believe the foot problem was related to Claimant's work injury in any way. The neurological examination was normal other than light edema and tenderness of the left foot. Dr. Puente again cleared Claimant to resume full duties at work and opined that Claimant seemed "to have recovered nicely from his severe closed head injury back in 11/02" and appeared to have no significant residual problems from his injury. He further opined that Claimant may have mild cellulites of the toes of the left foot. From a neurological standpoint, Dr. Puente's opinion did not change – Claimant's neurological complaints had been healed by the summer of 2003 and he could return to full duty work.<sup>124</sup>

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<sup>122</sup> EX-5, pp. 49-54, 80; CX-4, pp. 15-16; EX-19, p. 8-9, 25.

<sup>123</sup> EX-5, p. 54; EX-19, p. 25.

<sup>124</sup> EX-5, pp. 54-59; CX-4, pp. 5-6; EX-19, pp. 10-11.

Claimant last saw Dr. Puente on 05 Mar 04. He was “dragged” there by his wife. Claimant’s wife gave a completely different scenario from what Claimant has expressed. Although Claimant informed Dr. Puente that he did not have problems answering direct questions, Mrs. Trepagnier stated that Claimant “is just not right ever since his injury.” His wife insists that he has had constant problems since his injury. She did not know what Claimant told Dr. Puente, but “none of it is true.” She finally came with him to the doctor’s appointment because Claimant is not getting better and something is wrong with him. Dr. Puente took a new history in the presence of Claimant’s wife. Claimant is very irritable and grumpy. She reported that he is forgetful and whenever she sends him to the store for something he forgets why. Claimant takes over-the-counter pain medication, including Extra-Strength Tylenol, Goody Powders, Stanback and the like. She stated that Claimant smokes 1-2 packs of cigarettes per day, not ½ pack. She did tell him that Claimant’s alcohol consumption is “much decreased.” Claimant complains to her about constant headaches and not being able to sleep at night. He paces around the room. He also describes frequent dizziness and lightheadedness, but has not actually fallen. There were no recent spells of loss of consciousness that he or his wife were aware of. Dr. Puente was taken aback by this new information which as a “complete turnaround as far as [his] opinions” were concerned.<sup>125</sup>

Dr. Puente confronted Claimant about his wife’s statements. She described behavioral, memory, and cognitive problems, all of which Claimant said did not exist. The impression he got from Claimant was “well, that’s her opinion.” In his experience, answers of patients recovering from head injuries like Claimant’s about their own recovery can be misleading or off mark. Dr. Puente believes Claimant has very poor insight about what his problems really are. He thinks Claimant is in denial regarding his problems and has no idea that he was even having problems. He did not think Claimant tried to hide anything, he just did not have the capability of understanding that he was not doing well. He performed a new neurological examination and picked up some elements of confusion that may be insignificant.<sup>126</sup> He had minor abnormalities, but otherwise the examination was normal. Doctors tailor their examinations and findings to how a patient tells them he is doing. Claimant was functioning well and Dr. Puente did not pick up on anything until Claimant’s wife came and told him about clear problems. That is when Dr. Puente went over Claimant with a “much more fine-toothed comb” so he could pick up on any abnormalities, even minor ones. Dr. Puente found Claimant’s wife to be honest, concerned, and genuine. Claimant, however, believed his wife was making a mountain out of a molehill.<sup>127</sup>

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<sup>125</sup> EX-5, pp. 60-62, 74; CX-4, pp. 2-3; EX-19, pp. 12-13.

<sup>126</sup> Claimant was confused about the date, but he had been off of work for awhile and people on vacation tend to lose track of time because it is no longer important.

<sup>127</sup> EX-5, pp. 62-70, 80-81.

Although Claimant completed the 11<sup>th</sup> grade, Dr. Puente opined that Claimant was basically at a 5<sup>th</sup> grade intellectual level. This is not something detectable through neurological examinations; it is something one picks up through conversations and behavior. He could tell that Claimant was not an intellectual by the way he behaved and the way he talked about his drinking. Intelligence itself is not felt to be affected by a brain injury, but one's ability to utilize that intelligence is.<sup>128</sup>

He would possibly attribute the issues of confusion found on 05 Mar 04 to the work injury, but it is hard to pin down. Claimant could have residual deficits such as memory problems and cognitive dysfunction, therefore, Dr. Puente opined that Claimant needed a neuropsychological evaluation and referred Claimant to Dr. Ciota. He also wondered if post-traumatic depression might be contributing to Claimant's problems. He started Claimant on Zoloft. Dr. Puente believed the Zoloft may also help Claimant with his headaches. Claimant should not be operating dangerous machinery, driving, working at heights or climbing. From a neurological standpoint, as of 05 Mar 04, Claimant could work light duty. He would defer to Dr. Ciota from a neuropsychological perspective. After a complete neuropsychological evaluation is performed, Dr. Puente would like to meet with Claimant again with his wife present because he would not trust making any decisions if Claimant came alone since he obviously misled him all along.<sup>129</sup>

From a neurological perspective Claimant reached MMI on 05 Mar 04, not 30 Dec 03 as previously reported. The 30 Dec 03 date was based on what Claimant told him, which was not reliable information. Dr. Puente put aside essentially everything Claimant has told him, based on his meeting with Claimant's wife, as misinformation. He hoped the neuropsychological evaluation would answer his questions regarding Claimant's condition.<sup>130</sup>

Claimant returned to Dr. Puente on 15 Aug 05 at Employer's request for a medical evaluation and for Dr. Puente to review various job descriptions for potential employment. Claimant advised Dr. Puente that he was doing well and was in a joking mood. He informed Dr. Puente that his drinking is limited because his wife will not give him money. He admitted to drinking one bottle of wine that morning. He hustled his wife for extra money, went to the store, and bought a bottle of Thunderbird wine which he drank prior to his doctor's appointment. "That's why [he] feel[s] nice now." Claimant reported occasional headaches, forgetfulness, and "seeing things." He clarified that he sees a bright light if he turns too quickly. He did not describe anything that suggested an actual hallucination. Claimant arrived at the appointment by bus by himself. He has no difficulty getting around.<sup>131</sup>

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<sup>128</sup> EX-5, pp. 66-67.

<sup>129</sup> EX-5, pp. 69-72, 74-75; CX-4, pp. 3-4; EX-19, pp. 11-12.

<sup>130</sup> EX-5, pp. 76, 80, 84-85.

<sup>131</sup> EX-19, addendum pp. 1-2.

Dr. Puente noted that he was not sure how reliable Claimant's history was since it has been unreliable in the past when he gave a completely different history than his wife did. However, he told Dr. Puente that he did not want to go back to work, but was trying to get disability to receive adequate pay. Dr. Puente conducted a complete neurological examination. Claimant appeared comfortable and was alert and oriented as to person, place, year, month, day, and date. This was an improvement over the last visit. His motor examination revealed normal strength and tone and his deep tendon reflexes were symmetric. His regular and tandem gait was unremarkable. Dr. Puente noted that although Claimant is unreliable with regards to obtaining a medical history, it appears clear that he could perform at work in some capacity. Claimant should not work at any type of heights or dangerous machinery. In addition, he should not drive. These limitations are specifically related to his history of questionable seizures. Dr. Puente did not see a problem with any of job descriptions other than with regards to working as a deli worker slicing meats and cheeses because of the small possibility of having a seizure. Claimant should not work with a knife; otherwise, he has no work restrictions.<sup>132</sup>

***Dr. Bostick testified via deposition and his medical records state in pertinent part that:***<sup>133</sup>

His is a board-certified orthopedic surgeon since July 2003. He first treated Claimant on 16 Nov 02. His original consultation occurred when Claimant was in the operating room at West Jefferson Medical Center. Claimant was undergoing an emergent splenectomy for intra-abdominal injury and Dr. Bostick was consulted due to Claimant's wrist deformity. His treatment was limited to Claimant's right wrist. He performed surgery on Claimant's right wrist on 16 Nov 02. Claimant had a comminuted and displaced right distal radius fracture. The larger bone in the wrist was fractured in multiple pieces and was displaced. The surgery was a success and Claimant's wrist was in satisfactory alignment and good hardware positioning. He continued treating Claimant while he was in the hospital for follow-up evaluations post-operatively. He next saw Claimant for a follow-up evaluation in the clinic on 10 Jan 03, after he was discharged from West Jefferson Medical Center. He also saw Claimant for follow-up appointments on 03 Feb 03, 03 Mar 03 and 24 Mar 03. On 03 Mar 03 he released Claimant to modified work duty with no lifting over 20 pounds.<sup>134</sup> On 24 Mar 03, Claimant had excellent grip strength, good range of motion of his wrist, no pain to palpation of his fracture sites, and his incisions were well healed and aligned. Dr. Bostick opined that Claimant could return to full duty work. Once Claimant returned to work, Dr. Bostick wanted him to return for a follow-up to evaluate how Claimant was tolerating his return to work. He wanted to make sure Claimant could tolerate work before opining that he reached MMI.<sup>135</sup>

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<sup>132</sup> EX-19, addendum p. 3.

<sup>133</sup> EX-7; EX-18.

<sup>134</sup> EX-18, p. 37.

<sup>135</sup> EX-7, pp. 5-12, 14, 17, 18-22, 26.

Dr. Bostick last treated Claimant on 05 May 03. Claimant was doing very well and had no significant complaints. Dr. Bostick conducted an orthopedic examination. Claimant's wounds were well-healed and he had normal range of motion of all his digits. He also had excellent grip strength and good distal pulses. He declared Claimant MMI as of 05 May 03. He did not calculate an impairment rating, but Claimant may have 2-3% impairment to the upper extremity at the most due to limited palmar flexion. It is also possible that Claimant has a 0% impairment to his upper extremity. Claimant reported to Dr. Bostick that he was tolerating his return to work. He released Claimant to regular work and opined that Claimant reached MMI. Dr. Bostick never addressed an impairment rating because Claimant told him he was doing his regular work and had a full range of motion. Had he known otherwise, he would have calculated an impairment rating.<sup>136</sup>

He did not treat Claimant for neuropsychological or psychological complaints. He strictly treated Claimant for his orthopedic complaints. He did not recommend any further treatment or surgery. As of 05 May 03, Claimant no longer needed physical therapy for his wrist. He found Claimant to be a cooperative patient. He did not place any restrictions upon Claimant when he returned him to regular duty work. His opinion releasing Claimant to regular duty work is based solely on Claimant's wrist injury.<sup>137</sup>

***West Jefferson Medical Center's medical records reflect in pertinent part that:*<sup>138</sup>**

Although it is for a period prior to the relevant period for this decision, on 11 Feb 03 Claimant was brought to the hospital in an unresponsive state and was admitted with a decreased level of consciousness and decreased respiration secondary to alcohol and cocaine intoxication.<sup>139</sup>

Claimant was admitted into the hospital on 24 Nov 03 for syncope and collapse. The CAT scan of the brain without contrast from 24 Nov 03 was compared to the 11 Feb 03 study and revealed a preexisting left inferior frontal cortical lesion of decreased attenuation, consistent with encephalomalacia, and an old contusion.<sup>140</sup>

Claimant has an outstanding medical bill from West Jefferson Medical Center for treatment after his heart attack on 17 May 03 in the amount of \$55,105.00.

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<sup>136</sup> EX-7, pp. 22-23, 27-29; EX-15, p. 44.

<sup>137</sup> EX-7, pp. 23-26.

<sup>138</sup> EX-12.

<sup>139</sup> EX-12, p. 1088.

<sup>140</sup> EX-12, pp. 63-64.

Claimant was admitted into the hospital on 15 May 03 with chest pain radiating down his left arm.<sup>141</sup> His diagnosis upon admission included chest pain syndrome, abnormal EKG, status post exploratory abdominal laparoscopy, status post severe traumatic episode after a fall, and a history of alcohol abuse. The pain lasted for three or more hours and he continued to feel a burning sensation. He did not respond to Tridil IV and was given morphine. Claimant had a normal EKG in February 2003 and the new EKG showed definite changes. Claimant's family gave a history of alcohol abuse; it did not come from Claimant.<sup>142</sup>

He was immediately taken to the catheterization lab and emergent PTCA and stint of the LAD were performed. Post PTCA, Claimant was 95% stenosis of the mid LAD. Post stenting, Claimant had 0% residual with TIMI III flow. Claimant had a single vessel obstruction of the mid LAD and segmental wall motion abnormalities involving the mid portion of the anterior wall to the apex and inferior wall of the heart. Left ventriculography revealed an ejection fraction of about 40-45%. Claimant also underwent left catheterization with percutaneous revascularization of the left anterior descending artery. A balloon was used for pre-dilation. Upon discharge, on 18 May 03, he was diagnosed with acute myocardial infarction, tobacco abuse, history of alcohol abuse, and history of severe head trauma and abdominal surgery. He was placed on Plavix, aspirin, Zantac, and Lopressor. Claimant was advised that he needed to make significant lifestyle modifications, including a cessation of tobacco use.<sup>143</sup>

Claimant was brought to West Jefferson Medical Center by Ambulance on 03 Jul 04 due the sudden onset of a seizure lasting about 10 minutes. Upon arrival by EMS to Claimant's home, Claimant was stimulated by voice and disoriented. The EMS' general impression was that Claimant was snoring, incontinent, and diaphoretic. The emergency room physician reported that Claimant presented with a new onset of seizures characterized by lost consciousness and unresponsiveness. This was a single isolated seizure. In addition, Claimant presented with a positive toxicology report, including ethyl alcohol, cannabinoids, and cocaine metabolites. He was also treated for acetaminophen poisoning primarily based upon Claimant's information regarding his time of ingestion and serum levels.<sup>144</sup>

A CT of his head without contrast was taken on 03 Jul 04. It showed an old left inferior frontal lobe encephalomalacia which may be due to prior trauma. There was no evidence of acute intracranial disease.<sup>145</sup>

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<sup>141</sup> Later in the report, it states that Claimant did not report radiation down his arm or neck.

<sup>142</sup> EX-12, pp. 1147, 1151, 1157-1159.

<sup>143</sup> EX-12, pp. 1147, 1151, 1181, 1184, 1191, 1200, 1219.

<sup>144</sup> EX-12, pp. 38-44, 47-49.

<sup>145</sup> EX-12, p. 50.

Claimant returned to West Jefferson Medical Center on 29 Jan 05 after the onset of seizure activity. The seizure was witnessed by Mrs. Trepagnier. Claimant reported that he did not remember the seizure. He urinated on his clothes during the seizure. Physical examination revealed that Claimant was in mild distress and anxious. He was discharged with instructions and given a prescription for his seizures.<sup>146</sup>

***Charity Hospital's medical records reflect in pertinent part that:*<sup>147</sup>**

Claimant went to Charity Hospital on 04 Mar 04 because of swollen toes. His toes had been swollen for three weeks. He went to the hospital one week prior due to his toes, but since then, the pain and swelling had increased. He was diagnosed with paronychia of the 2<sup>nd</sup> and 4<sup>th</sup> left toes. An imaging report was taken of his left foot. There was no evidence of fractures or dislocations. Mineralization and alignment appeared normal. There was soft tissue swelling at the dorsal aspect of the foot. The doctor prescribed him Percocet, Motrin, and Keflex. He was told to make an appointment with a podiatrist.<sup>148</sup>

He returned to Charity Hospital on 16 Jul 04 after his 03 Jul 04 seizure. He needed a neurologist appointment. He was told by West Jefferson Medical Center that he needed to follow-up with a neurologist, but he cannot afford one. He reported that the seizure occurred while he was lying on the couch. His mother witnessed him falling to the floor and convulsing. He lost control of his bladder, but did not bite his tongue. There was no trauma; however, he was positive for post-ictal confusion and loss of consciousness. The doctor at Charity Hospital referred him to a neurologist.<sup>149</sup>

Claimant went back to Charity Hospital on 26 Aug 04 with a referring diagnosis of seizures. An EEG was taken. It was mildly abnormal consistent with underlying cerebral dysfunction in the right anterior temporal region. He had increased beta, most likely secondary to medication effect.<sup>150</sup>

Vocational Evidence

***Dot Moffett-Douglas testified at trial and her vocational rehabilitation report states that:*<sup>151</sup>**

To prepare to look for jobs, she reviewed Claimant's medical records from Dr. Ciota, Dr. Bostick, Dr. Puente, and LSU Health Services Center. She also reviewed the

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<sup>146</sup> EX-12, pp. 52-61.

<sup>147</sup> EX-24.

<sup>148</sup> EX-24, p. 38-44.

<sup>149</sup> EX-24, pp. 49-51.

<sup>150</sup> EX-24, p. 65.

<sup>151</sup> Tr. 48-82; CX-7 and EX-15 (vocational rehabilitation report dated 03 Aug 05).

depositions of Dr. Ciota and Dr. Bostick. She met with Claimant personally on 12 Apr 05. The purpose of her meeting with Claimant was to assist with the vocational assessment. She interviewed Claimant about past work experiences, education, training, interests, hobbies, and reviewed his medical condition. Their meeting lasted over one hour. Claimant was cooperative during their meeting and answered all of her questions. He indicated that he was interested in returning to work, specifically back to work for Employer as a cleaner or janitor. He believed he could perform that type of work.<sup>152</sup>

Claimant dropped out of high school. His full scale IQ is 69. He worked for Employer on three separate occasions since high school as a tack welder, scaffold builder, and welder. He had been laid off from these positions and then rehired. He also worked at Barbe's Dairy as a material handler for about eight years. He was an electrician's helper with MyTech in New Orleans for about six months and also worked as an electrician's helper through the union. He has one year experience as a cleaner in 1979. He is interested in returning to work as a cleaner.<sup>153</sup>

It is very important to get a work history to help determine whether there are transferable skills. It is also helpful when looking for other occupations that a claimant may be able to perform. Transferable skills are skills that are learned in one occupation which can be used to train on the job or through previous experience for a new occupation. She determined that Claimant had transferable skills. Claimant has performed work considered unskilled, semi-skilled and has supervised a crew of three. When she looked at his past jobs, she got a reasoning math and verbal level for each position and that transfers into what he should be able to do for new or similar jobs. Claimant's reasoning was level four, which is dealing with practical problems and interpreting written and oral instructions. Math was level four. This means Claimant should be able to add, subtract, multiply, and divide. These skills came mainly from the electrician's helper position. Claimant had the highest math level. His language level was at level two. He is able to read instructions to assemble items, and use compound sentences with the proper punctuation.<sup>154</sup>

Based on the combined occupations Claimant performed in the past, the worker function codes for that should be Data. Claimant should be able to compile, compute, and copy data. He should also be able to speak, signal, and take instructions. He is at level one regarding things which means he should be able to perform precision work, operating, driving, manipulating, tending, and handling. She then compares the transferable skills with the medical records.<sup>155</sup>

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<sup>152</sup> Tr. 47-49; CX-7; EX-15.

<sup>153</sup> Tr. 50; CX-7, pp. 3, 5; EX-15, p. 3, 5.

<sup>154</sup> Tr. 50-52; CX-7, pp. 3-5; EX-15, pp. 3-5.

<sup>155</sup> Tr. 52-53; CX-7, p. 5; EX-15, p. 5.

When she met with Claimant in April 2005, she asked him if he wanted to return to work and he told her that he did. He said that he was interested in working as a custodian or returning to Employer in a modified position. He does not like food service occupations and prefers to work outdoors. He wants the same rate of pay or possibly a pay increase. He would like to work as a janitor for Employer at a \$9.00 hourly rate.<sup>156</sup>

As a result of her meeting with Claimant and reviewing his records, she found several jobs for Claimant as reflected in the Labor Market Survey. The Labor Market Survey identified a custodian housekeeper job that paid \$7.00 per hour for a full-time medium duty position. This job would require Claimant to clean apartments to make it ready for new tenants. He would also need to clean walls, floors, stoves, and refrigerators. The employer requires six months experience, but no high school diploma needed. She also identified a job as a janitor cleaner, also available full time, and a job as a general maintenance worker at Manhattan Collision Center. All three of these positions were available the weeks of 13 May 05 and 18 Jul 05. The job as a janitor/cleaner paid \$6.15 per hour. Claimant would be required to operate cleaning equipment. The employer asks that applicants have one year experience, but does not require a high school diploma. It is available full time and is considered heavy duty work. The position as a general maintenance worker paid \$6.50 per hour. Claimant would be required to sweep and collect trash at an office, shop and warehouse. He would also be required to mop floors and pick up trash in the parking area. This employer also required one year experience and did not require a high school diploma. This job was available full time and was considered medium duty work. The job was available the week of 01 Aug 05. Based upon her review of the medical records and Claimant's age, education, work history, geographical location, etcetera, it is Ms. Moffett-Douglas' opinion that Claimant could have a reasonable expectation of being employed.<sup>157</sup>

Ms. Moffett-Douglas personally met with Dr. Ciota, on 14 Jul 05, to gain insight on Claimant's potential to return to work. Dr. Ciota opined that Claimant could return to some form of work. The effects of Claimant's type of injury could be problems with impulsiveness, low attention span, and self regulation which can be lasting effects of a head injury. Dr. Ciota indicated that Claimant has normal learning and memory ability and that returning to work would have the benefit of structure for Claimant. Claimant also has the capacity to follow instructions and learn and recall new information. Ms. Moffett-Douglas showed Dr. Ciota the job descriptions and Dr. Ciota approved all of the jobs from a cognitive perspective, but deferred to Dr. Puente regarding physical restrictions. Dr. Ciota recommended that a vocational counselor monitor Claimant's return to work behavior each week for about two to three months, then monthly after that. Dr. Ciota believed Claimant's main problem is his long standing problem with alcohol abuse. She also recommended outpatient treatment for alcohol abuse. In light of Dr.

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<sup>156</sup> Tr. 53; CX-7, p. 5; EX-15, p. 5.

<sup>157</sup> Tr. 54-56; CX-7, pp. 7-8; EX-15, pp. 7-8.

Ciota's deferment, Ms. Moffett-Douglas contacted Dr. Puente. She did not meet with Dr. Puente personally, but sent him a copy of the job descriptions for him to review, sign off and send back. He approved all of the jobs as well. Although Dr. Puente approved the deli worker position, he said Claimant should not slice or use a knife because of the possibility of a seizure. After she checked with Dr. Ciota, Ms. Moffett-Douglas checked to make sure the positions were still available. She contacted the potential employers in May and again in July after speaking with Dr. Ciota. Each job remained open. She did not know if the jobs had filled and were just available again. She did not know if these jobs were available throughout the entire period of May through July 2005, just that they were available when she called.<sup>158</sup>

At the request of the adjuster, a Labor Market Survey was performed to locate what jobs were available in May 2003, but it only took into account Dr. Bostick's restrictions. The jobs identified were considered light to medium/heavy, which means a worker should be able to handle anywhere from 20 pounds up to 70 pounds. She identified a position with Alamo as a cleaner available in May 2003 which paid \$6.50 per hour. The employer would train the employee to match clothes with a customer ticket and employee would pull the ticket, count the number of clothes and place the ticket on the bag for payment. This is a light duty position. The job remained open, it did not get filled and then reopen. She recalled because she looked for jobs for other people too. She was sure it was open. She also located a housekeeping/porter position with Sav-a-Center that paid \$7.00 per hour and was considered medium/heavy duty work. Claimant would be required to clean floors, isles, and bathrooms. Experience was preferred because an employee will use janitorial supplies and maintain the work area. As far as she knew, the job was open on the day she called, but she did not know how long it was actually open. She identified another cleaning position with Economy Inn that was open in May 2003 as well. The position paid \$7.00 per hour and required an employee to work as a cleaner in a motel to make beds, replenish liners, clean halls, and vacuum. This job was also considered medium duty. She could not state how long this job was available, just that it was open in May 2003. She could not testify if it was open for any time beyond the date that she called. "If [she] had [her] reports here, [she] could find a specific date." She located these jobs by going through the reports she did in other cases and incorporated them by reference into Claimant's report. She could not state how long during May 2003 that the jobs were available, just that they were available on or about 05 May 03.<sup>159</sup>

Some of the job descriptions she sent to Dr. Puente reflected on the August 2005 Labor Market Survey were not for actual available jobs. For example, the job as a laborer was just a job description, not an actual job. Part of the job duties of a laborer would require the worker to follow oral instructions. Although a vocational report from

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<sup>158</sup> Tr. 58-62; CX-7, p. 2; EX-15, p. 2.

<sup>159</sup> Tr. 56-57, 62-66, 81; CX-7, p. 7; EX-15, p. 7.

Denise Blakely from 2003 was part of the exhibit, Ms. Moffett-Douglas denied seeing it. The report states that Ms. Blakely's opinion was that Claimant had trouble following written instructions. Ms. Moffett-Douglas testified that had no application to his ability to follow oral instructions. In addition, Dr. Ciota opined that Claimant could follow instructions. She did not know whether Dr. Ciota considered Ms. Blakely's report, just that she herself never saw it.<sup>160</sup>

The job description of a laborer reflects that there would be, pursuant to oral instructions, secure lifting attachments for transport. This means that when material is loaded onto a truck from a pallet, it needed to be secured and tied down for moving. A lifting attachment would be the banding on the materials that is lifted and placed on the truck then secured down. This is done by hand and does not require a crane or hoisting. Claimant is able to put something on a truck and tie it down. This is basically the job that Claimant worked at Barbe's Dairy. She did not contact Barbe's Dairy to see if it had a position open. She did not contact any of Claimant's past employers to see if they had any available work for Claimant.<sup>161</sup>

Some of the jobs identified were for actual available jobs. She identified a position as a deli/fast food worker. This job comes from Claimant's transferable skills and doctor's approval. She did not have a specific employer for this position. The work described as "fast food worker" is not for an actual place, but is for a place equal to McDonald's or Burger King. Claimant does not want to do this type of work. She did not contact any employers based on this job description. In addition, Dr. Puente did not sign off on this job because he feared that Claimant may injure himself if he has to slice meat or cheese or use a knife since there is a possibility of on the job seizures. Dr. Puente approved this job with the caveat that Claimant did not work with knives. When working for a deli, it is probably a critical function to be able to use a knife and cut things. Therefore, Claimant could probably not work as a deli worker, but he could still work as a fast food worker at the front counter. Ms. Moffett-Douglas could not say whether there was someone out there that had a job available as a fast food/deli worker.<sup>162</sup>

Dr. Puente approved a position as a cook/baker/helper job. The job duty description stated that worker would cut and grind meat. He might use a slicer instead of a knife, but if the job required him to cut things, she would definitely want to find out what was being used to cut. She initially stated that Dr. Puente merely said Claimant could not work with a knife, but later clarified if Dr. Puente stated no slicer or knife, then this position would be ruled out as a SAE.<sup>163</sup>

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<sup>160</sup> Tr. 67-70.

<sup>161</sup> Tr. 70-71.

<sup>162</sup> Tr. 71-73.

<sup>163</sup> Tr. 73-74.

Ms. Moffett-Douglas also identified work as a custodian related to the job description itself, not specific employers. It does not represent jobs that are available right now, just skills that relate to other jobs Claimant had where he developed his transferable skills. As a custodian he would have to use cleaning equipment such as, buffers, mops, disinfectants, sweepers, and wet/dry vacuum. Even if Claimant had problems with written instructions, she did not believe that it would affect his ability to operate a wet/dry vacuum. He could learn by following oral instructions. He could also learn how to mix chemicals or cleaning solutions through oral instructions. Claimant could learn how to do it just like he learned how to use a tape in scaffold building – by following oral instructions. The cleaning positions are at a level one for reasoning math and language. She understood that it is normal to dilute cleaning solutions with water and that there was a possibility that he would have to mix two different solutions, but she believed he could learn that through oral instruction also. Seizures would not affect his ability to do this job.<sup>164</sup>

She further identified a position as a dining room attendant which consisted of general restaurant type work. The critical function of the job would require Claimant setting silverware or clearing tables. The definition of silverware would include both steak and butter knives. She could not comment on whether carrying knives posed less of a threat than using a knife in terms of Claimant's seizures. She could not testify as to whether his seizures would affect his ability to do this type of work and stated that she did not believe that it fell within her realm of expertise. She believed that it was a medical opinion. From a vocational standpoint, she did not think it would affect his ability to do his job. Doing the job itself as a dining room attending is not affected by seizures.<sup>165</sup>

To determine whether seizures would present problems for Claimant to perform the jobs she listed in the Labor Market Survey, she would have to look at each specific job individually because seizures could cause problems.<sup>166</sup>

## ANALYSIS

### Compensable Injury

This case presents not only an issue regarding a medical opinion, but also “mingled elements of fact[s], medical opinion[s] and inference[s].”<sup>167</sup> The instant case consists of medical opinions related to Claimant's current injury coupled with the testimony of Claimant and medical records predating the subject injury.

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<sup>164</sup> Tr. 74-78.

<sup>165</sup> Tr. 78-81.

<sup>166</sup> Tr. 78.

<sup>167</sup> *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

### *Myocardial Infarction*

Claimant contends that his myocardial infarction (MI) arose out of his treatment for an injury which occurred in the course and scope of employment. The record shows: (1) Claimant suffered an injury at work, (2) as a part of the treatment for that injury he was prescribed and took Celebrex, and (3) Claimant suffered an MI. There is no evidence in the record of a possible causative link between the Celebrex and the MI or the injury and the MI. Counsel's statement in his brief that the Food and Drug Administration issued a warning that patients taking Celebrex were at an increased risk for heart attacks and stroke, is not evidence. Consequently, there is nothing in the record to invoke the Section 20(a) presumption as to the MI. Therefore, the Court finds that Claimant's heart problems are not related to his work injury and he cannot recover under the Act for the treatment of those problems.

### *Alcohol Abuse*

Dr. Ciota stated that it was possible that the work injury may have aggravated or accelerated the cognitive deficits resulting from Claimant's pre-existing alcohol abuse. That is sufficient to invoke the Section 20(a) presumption. The record does contain substantial evidence that would rebut that presumption, but even if it had, the weight of the evidence as a whole is that Claimant's cognitive functions decreased dramatically after his accident. While it is possible they may have done so in the absence of the accident, solely as a function of his alcohol abuse, the pace clearly accelerated after his injury. Accordingly, I find that the un rebutted presumption applies and find Claimant's preexisting alcohol abuse to have been aggravated by the injury at work.<sup>168</sup>

### **Maximum Medical Improvement**

Dr. Ciota stated that Claimant's capacity to work will not be maximized until he is treated for his alcohol abuse. Accordingly, he has not reached maximum medical improvement and his disability status remains temporary.

### **Nature and Extent of Disability & Suitable Alternative Employment**

Underlying the nature and extent analysis is the fundamental fact that Claimant was and is still unable to return to his original job.<sup>169</sup> Consequently, Claimant is

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<sup>168</sup> I also considered the toe injury, but found no evidence to raise the section 20(a) presumption.

<sup>169</sup> Employer never argued that Claimant could return to his original job. Employer merely states on brief that as of May 2003, Claimant was no longer entitled to compensation benefits. In the alternative, Employer argues that if the Court found compensation benefits owed beyond May 2003, then the benefits should have ceased as of May 2005. During formal hearing, however, Employer's counsel stated that Employer agrees that Claimant could not go back to his original job scaffolding and the only remaining issue, as to the type of compensation Claimant would be entitled to, is whether Employer established suitable alternative employment.

considered totally disabled until such time as the record establishes suitable alternative employment. Thus the issue is what, if any jobs, could/can Claimant do, and at what point could he have done them.

One of the central questions is whether the jobs identified as available in May 2003, by Employer, qualify as SAE. Those jobs were based on Dr. Bostick's opinion that Claimant could return to regular duty as of 05 May 03. But that was only from an orthopedic standpoint. Although Dr. Puente originally opined that Claimant could return to full duty as of 30 Dec 03, he based that on an assumption that the history and subjective reports Claimant gave him were true. After hearing from Claimant's wife, Dr. Puente determined that Claimant was unreliable. Based on the more credible information from the wife, he amended his opinion and found that Claimant could return to limited duties in March 2004.

Claimant testified that he could physically return to work, but would not do so unless it is worth it financially. He wants to earn at least \$300-400 per week and testified that \$150 is just not enough to get him to go back to work. Although Claimant denies doing so, both Drs. Puente and Ciota's records indicate he told them his lawyer advised him not to go back to work. The Court finds the doctors' records to be more credible.

Claimant is not a particularly reliable source of information, whether as a witness giving testimony or a patient giving a history. Therefore, it is difficult to accept at face value his testimony that he could go work, but would not, unless the money is right. His spouse gave persuasive testimony about Claimant's cognitive problems and the difficulties he would face in taking on a job. On the other hand, she has a motive in seeing her husband awarded disability.

Therefore, the most probative evidence comes from Drs. Puente and Ciota. They were his treating physicians and saw him over an extended period. Of major significance is the fact that Dr. Puente has had an opportunity to assess the reliability of both Claimant and his wife in conjunction with his objective tests and examinations.

Dr. Puente opined that Claimant could return to work on 05 Mar 04, with restrictions not to operate dangerous machinery, not to drive, and not to work at heights or climb. After re-evaluating Claimant on 15 Aug 05, Dr. Puente reiterated that opinion. Dr. Puente also reviewed the job descriptions and approved them, with the exception that Claimant could not work as a deli worker because he should not work with knives.

In June 2004, Dr. Ciota reported that while Claimant had problems which were consistent with a frontal lobe injury and frontal lobe injuries affect a person's behavior, a person with a brain injury is still capable of "doing something" to earn money. She reviewed and approved for Claimant the jobs submitted by the vocational expert.

Ms. Moffett-Douglas, a vocational expert, interviewed Claimant in April 2005, reviewed his medical records, and located several jobs she believed qualified as SAE. Dr. Puente and Dr. Ciota reviewed and approved the following jobs: deli worker/fast food, dining room attendant, custodian, cook/baker helper, and laborer. In her Labor Market Survey, however, she only identified positions as a custodian housekeeper, janitor/cleaner, and a general maintenance worker. These jobs required Claimant to perform duties such as clean walls, floors, stoves and refrigerators, operate cleaning equipment, sweep, mop, and collect trash. All three positions were available in the weeks of 13 May 05 and 18 Jul 05. The jobs paid \$7.00, \$6.15, and \$6.50, respectively. Ms. Moffett-Douglas was aware that Claimant began having seizures. From a vocational standpoint, she did not think it would affect his ability to work. Both doctors were similarly aware of Claimant's reported seizures. That led to Dr. Puente's refusal to approve any job involving a knife.

In addition to Claimant's doctors' opinions, Ms. Moffett-Douglas based her opinion upon a review of the medical records and Claimant's age, education, work history, and geographical location. That led her to conclude Claimant could have a reasonable expectation of becoming employed. Based upon the review of the record, the Court finds that Employer established available SAE as of 13 May 05 as to the custodian housekeeper and the general maintenance positions only. Both these jobs are considered medium duty and were approved by Dr. Puente and Dr. Ciota.

Claimant is still totally disabled if he tried with reasonable diligence to secure SAE and was unsuccessful. Claimant never tried to obtain employment. He consistently testified that he was unwilling to work a minimum wage job. He admitted that he could physically do the job, but would not work at a fast food restaurant or anywhere else that did not pay him at least \$300-400 per week.

Claimant remained totally disabled until 13 May 05, at which time he became partially disabled. Accordingly, the evidence establishes that as of 13 May 05, Claimant had a post-injury earning capacity of \$6.75 per hour.

### **Medical Care Benefits**

#### *Reasonableness of West Jefferson Medical Center's Medical Bills*

Since the Court found that Claimant's heart problems are not related to his work injury of 15 Nov 02, Claimant is not entitled to payment of his West Jefferson Medical Center bill from May 2003.

### *Alcohol Abuse*

Given the Court's finding that Claimant's alcohol abuse is a compensable aggravated pre-existing condition. Treatment for such a condition may be included in reasonable and necessary medical care. Given Dr. Ciota's statement that Claimant's working capacity may be improved by alcohol abuse treatment, if Claimant unreasonably refuses such treatment, compensation may be suspended.<sup>170</sup>

### *Choice of Physician*

Upon his discharge from the hospital, Claimant was told to follow-up with Dr. Puente within 2 weeks. While he never signed a form clarifying his choice of physician, he accepted Dr. Bostick, Dr. Puente, Dr. Ciota as his choice of physicians by continuing to treat with them for an extended period of time after his emergent treatment was completed, he had been discharged from inpatient care, and had fully recovered his ability to understand and choose his medical care providers. The most probative evidence on this point is Claimant's testimony that he continued to see Dr. Puente because one doctor is as good as the next.

Claimant was released from West Jefferson Medical Center in February 2003 and did not treat with Dr. Puente again until September 2003. He was referred back to Dr. Ciota by Dr. Puente and accepted that referral by submitting to reevaluations with her.

Although Claimant's counsel maintains that a request for choice of physician was made, there is nothing in the record reflecting such requests by Claimant or any denials from Employer. Claimant's own attorney sent Claimant back to Dr. Puente on 19 Sep 03 for a re-evaluation. Because Claimant continued to obtain treatment with Dr. Bostick, Dr. Puente, and Dr. Ciota for over two years, even after he was released from inpatient care, it is rational to conclude that they were his physicians of choice.

To prevail on his claim that he was withheld his choice of psychiatrist, Claimant must first establish that such treatment is reasonable and necessary, which he has not done. Therefore, the Court finds that Claimant was not denied his free choice of psychiatrist.

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<sup>170</sup> 33 U.S.C. §907(d)(4); *Hrycyk v. Bath Iron Works*, 11 BRBS 238 (1979); *Mitchell v. Randolph Air Force Base*, BRB No. 99-0380 (Dec. 23, 1999) (unpublished).

## ORDER AND DECISION

1. Claimant's heart attack is not a compensable injury.
2. Claimant has not yet reached Maximum Medical Improvement.
3. Claimant has a post-injury earning capacity of \$6.75 per hour as of 13 May 05.
4. Employer shall pay Claimant compensation for temporary total disability from 18 May 03 until 12 May 05 based on an average weekly wage of \$410.78 at the time of injury.
5. Employer shall pay Claimant compensation for temporary partial disability from 13 May 05 to present and continuing, based on an average weekly wage of \$410.78 at the time of injury and a weekly post-injury earning capacity of \$270.00.<sup>171</sup>
6. Except for the medical bills from West Jefferson Medical Center from May 2003, related to Claimant's heart problems, which are not recoverable, Employer shall pay all reasonable, appropriate, and necessary medical expenses arising from Claimant's work injury, including treatment for alcohol abuse, pursuant to the provisions of Section 7 of the Act.
7. Claimant has been provided with his choice of physician and his claim in that regard is denied.
8. Employer shall receive credit for all compensation hereto paid, as and when paid.
9. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961.<sup>172</sup>

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<sup>171</sup> The post-injury earning capacity shall be adjusted to the time of injury by the application of the discount rate as set by the change in the National Average Weekly Wage. *Richardson v. Gen. Dynamics Corp.*, 19 BRBS 48 (1986).

<sup>172</sup> Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *Grant v. Portland Stevedoring Co., et al.*, 16 BRBS 267 (1984)

10. The district director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.
11. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.<sup>173</sup> A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. In the event Employer elects to file any objections to said application it must serve a copy on Claimant's counsel, who shall then have fifteen days from service to file an answer thereto.

**So ORDERED.**

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**PATRICK M. ROSENOW**  
**Administrative Law Judge**

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<sup>173</sup> Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 813 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **13 Oct 04**, the date this matter was referred from the District Director.